

§ 1.367(b)–10

26 CFR Ch. I (4–1–13 Edition)

Separate category	E&P	Foreign taxes
Passive	(1,000u)	\$5
General	200u	200
	(800u)	205

Example 2. (i) *Facts.* (A) Foreign corporations B, C and D are and always have been wholly owned subsidiaries of USP, a domestic corporation. Foreign corporation B was incorporated in 2000 and foreign corporations C and D were incorporated in 2001. Foreign corporation B does not own any significant property and has no earnings and profits or foreign income taxes accounts. Both foreign corporations C and D have always had a calendar taxable year. Foreign corporations C and D (and all of their respective qualified business units as defined in section 989) maintain a “u” functional currency. On December 31, 2006, foreign corporations C and D have the following post-1986 undistributed earnings and post-1986 foreign income taxes:

	E&P	Foreign taxes
<i>Foreign corporation C Separate Category:</i>		

	E&P	Foreign taxes
Passive	(900u)	\$50
General	(200u)	100
	(1100u)	150
<i>Foreign corporation D Separate Category:</i>		
Passive	1200u	400
General	400u	100
	1600u	500

(B) On January 1, 2007, USP foreign corporations C and D merge into foreign corporation B in a reorganization described in section 368(a)(1)(A).

(ii) *Result.* Although the merger is a foreign section 381 transaction involving a foreign corporation with no property or tax attributes, paragraph (b) of this section does not apply because more than one foreign corporation with significant tax attributes is involved in the foreign section 381 transaction. Accordingly, under § 1.367(b)-7(d), foreign surviving corporation B has the following post-1986 undistributed earnings and post-1986 foreign income taxes immediately after the foreign section 381 transaction:

Separate Category	Earnings & profits		Foreign taxes	
	Positive E&P	Hovering deficit	Foreign taxes available	Foreign taxes associated with hovering deficit
General	1200u	(900u)	\$400	\$50
Passive	400u	(200u)	100	100
	1600u	(1100u)	500	150

(e) *Effective date.* This section shall apply to section 367(b) transactions that occur on or after November 6, 2006.

[T.D. 9273, 71 FR 44913, Aug. 8, 2006]

§ 1.367(b)–10 Acquisition of parent stock or securities for property in triangular reorganizations.

(a) *In general—*(1) *Scope.* Except as provided in paragraphs (a)(2)(i) through (iii) of this section, this section applies to a triangular reorganization if P or S (or both) is a foreign corporation and, in connection with the reorganization, S acquires in exchange for property all or a portion of the P stock or P securities (P acquisition) that are used to acquire the stock, securities or property of T in the triangular reorganization. This section applies to a triangular reorganization regardless of whether P

controls (within the meaning of section 368(c)) S at the time of the P acquisition.

(2) *Exceptions.* This section shall not apply if—

(i) P and S are foreign corporations and neither P nor S is a controlled foreign corporation (within the meaning of § 1.367(b)-2(a)) immediately before or immediately after the triangular reorganization;

(ii) S is a domestic corporation, P’s stock in S is not a United States real property interest (within the meaning of section 897(c)), and P would not be subject to U.S. tax on a dividend (as determined under section 301(c)(1)) from S under either section 881 (for example, by reason of an applicable treaty) or section 882; or

(iii) In an exchange under section 354 or 356, one or more U.S. persons exchange stock or securities of T and the amount of gain in the T stock or securities recognized by such U.S. persons under section 367(a)(1) is equal to or greater than the sum of the amount of the deemed distribution that would be treated by P as a dividend under section 301(c)(1) and the amount of such deemed distribution that would be treated by P as gain from the sale or exchange of property under section 301(c)(3) if this section would otherwise apply to the triangular reorganization. See § 1.367(a)-3(a)(2)(iv) (providing a similar rule that excludes certain transactions from the application of section 367(a)(1)).

(3) *Definitions.* For purposes of this section, the following definitions apply:

(i) The terms *P*, *S*, and *T* have the meanings set forth in § 1.358-6(b)(1)(i), (ii), and (iii), respectively.

(ii) The term *property* has the meaning set forth in section 317(a), except that the term *property* also includes—

(A) A liability assumed by S to acquire the P stock or securities; and

(B) S stock (or any rights to acquire S stock) to the extent such S stock (or rights to acquire S stock) is used by S to acquire P stock or securities from a person other than P.

(iii) The term *security* means an instrument that constitutes a security for purposes of section 354 or 356.

(iv) The term *triangular reorganization* has the meaning set forth in § 1.358-6(b)(2).

(b) *General rules*—(1) *Deemed distribution.* If this section applies, adjustments shall be made that have the effect of a distribution of property (with no built-in gain or loss) from S to P under section 301 (deemed distribution). The amount of the deemed distribution shall equal the sum of the amount of money transferred by S, the amount of any liabilities that are assumed by S and constitute property, and the fair market value of other property transferred by S in the P acquisition in exchange for the P stock or P securities described in paragraph (i) or (ii), respectively, of this paragraph (b)(1)—

(i) P stock received by T shareholders or securityholders in an exchange to which section 354 or 356 applies.

(ii) P securities received by T shareholders or securityholders to the extent such securities are “other property” (within the meaning of section 356(d)).

(2) *Deemed contribution.* If this section applies, adjustments shall be made that have the effect of a contribution of property (with no built-in gain or loss) by P to S in an amount equal to the amount of the deemed distribution from S to P under paragraph (b)(1) of this section (deemed contribution).

(3) *Timing of deemed distribution and deemed contribution.* If P controls (within the meaning of section 368(c)) S at the time of the P acquisition, the adjustments described in paragraphs (b)(1) and (2) of this section shall be made as if the deemed distribution and deemed contribution, respectively, are separate transactions occurring immediately before the P acquisition. If P does not control (within the meaning of section 368(c)) S at the time of the P acquisition, the adjustments described in paragraphs (b)(1) and (2) of this section shall be made as if the deemed distribution and deemed contribution, respectively, are separate transactions occurring immediately after P acquires control of S, but prior to the triangular reorganization.

(4) *Application of other provisions.* Nothing in this section shall prevent the application of other provisions of the Internal Revenue Code from applying to the P acquisition. For example, section 304 may apply to the P acquisition. Furthermore, section 1001 or 267 may apply to S's transfer of property to acquire P stock or securities from P or a person other than P. In addition, generally applicable provisions that apply to triangular reorganizations, such as § 1.358-6 and § 1.1032-2, shall apply to the triangular reorganization in a manner consistent with S acquiring the P stock or securities in exchange for property from P or a person other than P, as the case may be.

(5) *Example.* The rules of this paragraph (b) are illustrated by the following example:

(i) *Facts.* P, a publicly traded domestic corporation, owns all of the outstanding stock

of FS, a foreign corporation, and all of the outstanding stock of US1, a domestic corporation that is a member of the P consolidated group. US1 owns all of the outstanding stock of FT, a foreign corporation, the fair market value of which is \$100x. US1's basis in the FT stock is \$100x, such that there is a no built-in gain or loss in the FT stock. FS has earnings and profits in excess of \$100x. FS purchases \$100x of P stock from the public on the open market in exchange for \$100x of cash. Pursuant to foreign law, FT merges with and into FS in a triangular reorganization that qualifies under section 368(a)(1)(A) by reason of section 368(a)(2)(D). In an exchange to which section 354 applies, US1 exchanges all the outstanding stock of FT for the \$100x of P stock purchased by FS on the open market.

(ii) *Analysis.* The triangular reorganization is described in paragraph (a)(1) of this section. P is a domestic corporation and FS is a foreign corporation. In connection with FS purchasing the \$100x of P stock in exchange for property (cash), FS uses the P stock to acquire the FT property in a triangular reorganization, and US1 receives the P stock in an exchange to which section 354 applies. Furthermore, none of the exceptions of paragraphs (a)(2)(i) through (iii) of this section apply. Therefore, pursuant to paragraph (b)(1) of this section, adjustments are made that have the effect of a deemed distribution of property (with no built-in gain or loss) in the amount of \$100x from FS to P under section 301. Pursuant to paragraph (b)(2) of this section, adjustments are made that have the effect of a deemed contribution of property (with no built-in gain or loss) in the amount of \$100x by P to FS. Pursuant to paragraph (b)(3) of this section, the adjustments described in paragraphs (b)(1) and (2) of this section are made as if the deemed distribution and deemed contribution, respectively, are separate transactions occurring immediately before FS's purchase of the P stock on the open market (see, for example, section 304) and in determining certain tax consequences to P and FS as a result of the triangular reorganization (see, for example, § 1.358-6(d) and § 1.1032-2(c)).

(c) *Collateral adjustments.* This paragraph (c) provides additional rules that apply by reason of the deemed distribution and deemed contribution described in paragraphs (b)(1) and (b)(2), respectively, of this section.

(1) *Deemed distribution.* A deemed distribution described in paragraph (b)(1) of this section shall be treated as occurring for all purposes of the Internal Revenue Code. Thus, for example, the ordering rules of section 301(c) apply to

characterize the deemed distribution to P as a dividend from the earnings and profits of S, return of stock basis, or gain from the sale or exchange of property, as the case may be. Furthermore, sections 902 or 959 may apply to the deemed distribution if S is a foreign corporation, and sections 881, 882, 897, 1442, or 1445 may apply to the deemed distribution if S is a domestic corporation. Appropriate corresponding adjustments shall be made to S's earnings and profits consistent with the principles of section 312.

(2) *Deemed contribution.* A deemed contribution described in paragraph (b)(2) of this section shall be treated as occurring for all purposes of the Internal Revenue Code. Thus, for example, appropriate adjustments shall be made to P's basis in the S stock.

(d) *Anti-abuse rule.* Appropriate adjustments shall be made pursuant to this section if, in connection with a triangular reorganization, a transaction is engaged in with a view to avoid the purpose of this section. For example, if S is created, organized, or funded to avoid the application of this section with respect to the earnings and profits of a corporation related (within the meaning of section 267(b)) to P or S, the earnings and profits of S will be deemed to include the earnings and profits of such related corporation for purposes of determining the consequences of the adjustments provided in this section, and appropriate corresponding adjustments will be made to account for the application of this section to the earnings and profits of such related corporation.

(e) *Effective/applicability date.* This section applies to triangular reorganizations occurring on or after May 17, 2011. For triangular reorganizations that occur prior to May 17, 2011, see § 1.367(b)-14T as contained in 26 CFR part 1 revised as of April 1, 2011.

[T.D. 9526, 76 FR 28893, May 19, 2011]

§ 1.367(b)-12 Subsequent treatment of amounts attributed or included in income.

(a) *In general.* This section applies to distributions with respect to, or a disposition of, stock—

(1) To which, in connection with an exchange occurring before February 23,